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CITATIONS TO OPINIONS BELOW.

The Opinion of the District Court and the Order Dismissing in the case of Tawanda R. Simmons is unreported and is printed in Appendix "A," hereto, infra, App. A pp. 23-31.

The Opinion of the District Court and the Order Dismissing in the case of Sandra Lee Simmons Shaw is unreported and is printed in Appendix "A," hereto infra, App. A, pp. 32-41.

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit in the consolidated appeals affirming the Orders of the District Court was entered July 7, 1970, and said Opinion appears in the certified Record on Petition for Writ of Certiorari and is printed in Appendix "B," hereto, infra, App. B, pp. 42-45. Said Opinion is reported.

JURISDICTION.

The Judgment of the Circuit Court of Appeals was entered on July 7, 1970, App. B, infra, pp. 42-45. The Jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1).

STATUTES INVOLVED.

The Statutes involved are the Securities Act of 1933, 15 U.S.C.A., Section 77a, et seq. and the Securities Exchange Act of 1934, 15 U.S.C.A., Section 78a, et seq., and the Rules and Regulations of the Securities and Exchange Commission issued thereunder. The specific sections relied on are printed in Appendix "C," infra, App. C, pp. 45-53.

STATUTES.

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QUESTIONS PRESENTED.

I. Did the Court improperly affirm the dismissal of the actions for lack of jurisdiction in holding that only a purchaser or seller is entitled to maintain a civil action under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Rules of the Securities and Exchange Commission, where petitioner-stockholders have alleged fraudulent manipulations of the corporation's subsidiaries by respondents and a fraudulent conspiracy by respondents to commit acts which violated the above statutes and the Rule of the Commission, all of which brought about a fraud on petitioners as investors and changed their position to their damage?

II. Did the Court improperly affirm the dismissal of the actions for lack of jurisdiction in holding that petitioners had no personal remedy but only a remedy through a derivative action, where petitioners have alleged that the respondent directors are in control of the corporation, have violated various provisions of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Rules thereunder, and that it would be futile to seek to have the directors take action, and where as alleged here, the respondent directors and officers and their families were controlling shareholders so that a recovery in a derivative action would inure to the benefit of the wrongdoers?

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ————

TAWANDA R. SIMMONS, - - - *Petitioner,*

v.

LOUIS E. WOLFSON, ET AL., - - *Respondents.*

SANDRA LEE SIMMONS SHAW, - - *Petitioner,*

v.

LOUIS E. WOLFSON, ET AL., - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners, Tawanda R. Simmons and Sandra Lee Simmons Shaw, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled consolidated cases on July 7, 1970.

STATEMENT OF THE CASE.

1. Facts.

These consolidated cases were filed as separate actions by the petitioners, Tawanda R. Simmons and Sandra Lee Simmons Shaw, as common shareholders

of Merritt-Chapman & Scott Corporation, against certain of the directors or past directors, and officers or past officers of said corporation and against certain other individuals with whom it is alleged the said directors and officers conspired.

The Complaint in the Simmons case was filed against Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover, Joseph Kosow and Alexander Rittmaster.

The Complaint in the *Shaw* case was filed against the same defendants (respondents) but added two additional persons, Isidore Sherman and Archibald Kleven.

Both Complaints were filed pursuant to the provisions of the Securities Act of 1933 (U.S.C.A., Title 15, Sections 77a, *et seq.*) and the Securities Exchange Act of 1934 (U.S.C.A., Title 15, Sections 78a, *et seq.*) and the Rules of the Securities and Exchange Commission.

The Complaints allege that Mrs. Simmons was the owner of 2,600 shares of the common stock of Merritt-Chapman & Scott Corporation and that Mrs. Shaw was the beneficial owner of 1,850 shares of said stock and that they had owned these since 1958 and 1959.

It is alleged that Merritt-Chapman & Scott Corporation was listed on the New York Stock Exchange and that the respondents used the mails and means of interstate commerce to issue and deliver proxies and financial statements which were false and misleading.

The Simmons Complaint alleges that the respondent directors and officers conspired to have Kosow and

others acquire and buy common stock of the corporation and that they secretly guaranteed that the corporation would repurchase said stock at a profit of 20% to 25%. The Shaw Complaint alleges the same facts but includes as defendants (now respondents), Archibald Kleven and Isidore Sherman, as well as Joseph Kosow.

The Complaints also allege that respondents unlawfully effected a series of transactions creating an actual or apparent trading to raise the price on the Exchange and to induce purchases by others and used manipulation and deceptive devices and schemes which operated as a fraud and deceit on the corporation and on petitioners in connection with the purchase of shares by Kosow, Sherman and Kleven, the sale of shares by Kosow, Sherman and Kleven and the purchase of said shares by the corporation.

The Complaints allege that the respondents, as officers and directors, failed to reveal in financial statements and other reports, the secret contract agreements and guarantees and the amounts of profits guaranteed and paid out of the corporation's funds.

It is alleged that defendant (now respondent), Kosow, formed Joint Ventures to buy said stock for resale to the corporation, pursuant to the conspiracy, and that the respondents, who were officers, directors and insiders, failed to reveal such arrangements in various communications sent to petitioners through the mail, and thereby omitted to state material facts necessary to make said statements not misleading, and that said respondents conspired to keep said information

secret, not only from the stockholders but also from the Securities and Exchange Commission.

Petitioners also allege that respondents manipulated the market to assist Kosow and his joint ventures and others, in acquiring stock, in violation of the statutes and rules and to petitioners' damage in the value of their investment and the return thereon.

It is further alleged that respondents conspired to conceal their actions and represented to their auditors that the transactions referred to were arms length transactions, causing the reports and financial statements to be false and misleading.

Further allegations of the Complaints are that respondents caused the corporation to conceal and misrepresent information as to liability of the corporation to purchase the stock at prices above the then market value and as to payment of unreasonable salaries and compensation and as to losses for bad loans in various reports and statements mailed to petitioners, making said communications false and misleading with respect to material facts and depriving petitioners of their right to know the true circumstances of the corporation.

Petitioners further allege that the respondents made untrue statements of material facts and omitted material facts in various reports, proxies, financial reports and communications to petitioners which were delivered by mail, which would keep said reports from being misleading, with the intent and purpose of having the stockholders and petitioners rely thereon.

Petitioners alleged that respondents caused the assets of Devoe and Raynolds Co., Inc., a subsidiary corporation, to be sold to obtain cash to carry out the conspiracy and failed to advise petitioners that said funds would be used to pay excessive profits to persons with whom they conspired. It is alleged that all of these devices, schemes, untrue statements of material facts and omissions of material facts operated as a fraud and deception on petitioners.

It is further alleged in the Complaints that the respondents caused the corporation to acquire Industrial Finance Corporation, Hub Finance and Congress Finance at prices in excess of the fair and reasonable value to benefit the sellers as against the interest of the petitioners. The detailed facts are not pleaded but petitioners will show that after selling the assets of Devoe and Raynolds Co., Inc., the respondents changed the corporate name of Devoe and Raynolds Co., Inc. to Revday, Inc., sold Industrial Finance Corporation, with which respondent, Joseph Kosow, was associated, to Revday, Inc., and then merged it into Merritt-Chapman & Scott Corporation. It is alleged that the cost of this acquisiton was three (3) million dollars *in excess of* the fair price, which was an unjust reward to respondent, Kosow, and deprived petitioners of their interests therein.

Petitioners allege that respondents represented that the corporation was buying its own stock but that the material fact of the conspiracy was that it was being bought at higher prices and at profits to persons with

whom respondents conspired and that by failing to state in their proxies, reports, financial statements and communications these material facts, said respondents made false representations to petitioners. It is alleged that they intentionally left out the material facts and that these false representations were made to induce petitioners and others to rely thereon.

2. Proceedings Below.

These actions were filed by Mrs. Simmons and Mrs. Shaw seeking damages and an accounting on account of respondents' violations of the provisions of the Securities Act of 1933 (U.S.C.A., Title 15, Sections 77a, *et seq.*), the Securities Exchange Act of 1934 (U.S.C.A., Title 15, Sections 78a, *et seq.*) and the Rules and Regulations of the Securities and Exchange Commission (Reg. § 240.10b-5, Rule 10b-5).

The various respondents in each of the actions filed Motions to Dismiss and Motions for Change of Venue. The Motions to Dismiss, among other things, were based on respondents' contention that petitioners failed to state a claim under the aforesaid acts because the plaintiff in such an action must be a purchaser or seller of the security involved in reliance upon the alleged manipulative or deceptive device and also their contention that the proper relief is through a derivative action.

After briefs were filed by the parties, the Trial Court sustained the Motions to Dismiss and on October 22, 1969, the Trial Court dismissed the Complaint in

each action (App. A, pp. 23-41). On November 20, 1969, the plaintiff in each action (Petitioners herein) filed a Notice of Appeal to the Sixth Circuit Court of Appeals.

The two actions were consolidated for the purposes of that appeal. They were briefed by the parties and subsequently argued on June 11, 1970, before the Sixth Circuit Court of Appeals.

On July 7, 1970, the Sixth Circuit Court of Appeals by written opinion affirmed the District Court's action in dismissing the suits for lack of jurisdiction (App. B, pp. 42-45). This Petition was then filed.

REASONS FOR GRANTING THE WRIT.

I. Did the Court Improperly Affirm the Dismissal of the Actions For Lack of Jurisdiction in Holding That Only a Purchaser or Seller is Entitled to Maintain a Civil Action Under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Rules of the Securities and Exchange Commission, Where Petitioner-Stockholders Have Alleged Fraudulent Manipulations of the Corporation's Subsidiaries by Respondents and a Fraudulent Conspiracy by Respondents to Commit Acts Which Violated the Above Statutes and the Rule of the Commission, All of Which Brought About a Fraud on Petitioners as Investors and Changed Their Position to Their Damage?

It is petitioners' contention that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and that the decision is in conflict with applicable decisions of the Supreme Court and is contrary to the holdings of other Courts of Appeal.

There has been much litigation in the district and circuit courts under the Securities Acts but only a few cases have been decided by the Supreme Court. Two cases that have been decided support petitioners' contentions herein.

Under Section 14a, with reference to false materials in solicitation of proxies relating to a proposed merger, the Supreme Court in *J. C. Case Co.* v. *Borak*, 337 U. S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964) held that there is a right of action as to both derivative and *direct* causes. In that decision the Court stated that the Act was for the *protection of investors* and *implies availability of judicial relief where necessary to achieve that result.* The Supreme Court's decision further stated that it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose. Further it is stated that where legal rights have been invaded and federal statutes provide for the general right to sue, the Federal Courts may use any available remedy to make good the wrong.

We think the above case clearly indicates an intention of this Court to protect investors. Petitioners were investors of long standing. The application of the purchase and sale requirement to these actions denies adequate protection to petitioners. As pointed out by the Supreme Court's decision, private enforcement of proxy rules provide a necessary supplement to the action of the Securities and Exchange Commission as civil damage actions are a most effective weapon.

In addition, we believe the principles set out in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U. S. [redacted] (1969) conflict with the Court of Appeals decision in these cases. The Commission took action against National Securities, Inc. to prevent a merger on the basis that there was a violation of Section 10b and Rule 10b-5. National Securities, Inc. controlled National Life and Casualty Co. and is alleged to have purchased a controlling interest in Producers Life Insurance Co. The defendants sought to obtain approval by Producers' stockholders of a merger with National Life. Misrepresentations were made of material facts and certain material facts were omitted according to the Commission's allegations. It is alleged that the shareholders were not told they were going to pay part of the cost of National Securities' acquisition of control of their Company. The Commission was denied temporary relief and a merger took place. The Commission then sought to unwind the merger. A large part of the Court's opinion relates to the effect of the McCarran-Ferguson Act, which has no bearing on the problem relating to the case at bar. However, Section III of the opinion relates to the application of Section 10b and Rule 10b-5. It was contended by the respondents therein that the Complaint failed to allege a "purchase or sale" and that Rule 10b-5 does not apply to misrepresentations in connection with solicitation of proxies.

The Supreme Court's decision stated that the shareholders of Producers Life were misled in various material respects prior to their approval of the merger

and that the deception furthered a scheme which resulted in their losing their status as shareholders of Producers and becoming shareholders in a new company. It is stated that this alleged deception has affected individual shareholders' decisions in a way not at all unlike that involved in a typical cash sale or share exchange. The Court states as follows:

> "The broad anti-fraud purposes of the statute and the rule would clearly be furthered by their application to this type of situation. Therefore we conclude that Producers Life's shareholders 'purchased' shares in the new company by exchanging them for their old stock."

That the above decision of the Supreme Court is an extension of or abandonment of the "purchase" or "sale" rule is seen from the dissenting opinion in that case which refers to the Court's decision as adopting a very loose construction of the requirement that a transaction must involve a "purchase" or "sale".

Petitioners herein take the position that they are entitled to maintain these actions even though they are not in the technical position of a seller or purchaser. It is further petitioners' position that the facts show petitioners have had their position changed by the sales and acquisitions carried on by the respondents and that their position has been changed in a similar manner as if there had been an exchange of stock in a merger.

We call the Court's attention to the words of Section 10 of the 1934 Act (Title 15, Section 78j) which reads "in connection with a purchase or sale". It is the position of petitioners that the various actions of

respondents which damaged petitioners' interests were "in connection with purchases" by the Corporation and the "sale" by some of the respondents and other persons of the stock back to the Corporation. We will find as hereinafter set out that issuance of stock by a corporation has been held to be a sale to which these Statutes apply and the natural corollary of this is that a repurchase of shares of stock by a corporation is a "purchase" within these statutes. It should be noted that the last words of Section 10 of the 1934 Act reads: "* * * *for the protection of investors*" so that it can be inferred that present investors as well as purchasers or sellers were intended to be protected.

Various Circuit Courts of Appeal have likewise made decisions the principles of which are contrary to the lower court's decision herein.

In a decision as early as 1951, the Second Circuit, in considering the rights of preferred and common stockholders to bring action based on untrue prospectus and registration statements, where the defendant was alleged to have employed manipulative and deceptive devices to defraud, stated:

> "Congress reasonably, and without inconsistency, allowed suits of that sort which
>
> (1) are free of the restrictions of §11 of 1933 Act, and
>
> (2) which are not confined to those persons who may properly sue under that section but *which include all who are the victims of the fraud.*"
>
> *Fischman* v. *Raytheon Manufacturing Co.*, 188 F. 2d 783 (2nd Cir., 1951). (Emphasis ours.)

The same Circuit in *Ruckle* v. *Roto American Corporation,* 339 F. 2d 24 (2nd Cir., 1964) interpreted Section 10b and Rule 10b-5. There an injunction was sought against the action of the corporation in issuing its own shares of stock. Certain of the directors had failed or refused to disclose fully to the remaining directors material facts concerning the transactions and the financial condition of the company. Certain financial statements had been withheld. The lower court, relying on the case of *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 461 (2nd Cir., 1952) cert. denied 343 U. S. 956, dismissed the Complaint. The Second Circuit reversed the case. The Court held the issuance of its own shares by the corporation was a sale to which the anti-fraud policy expressed in the Federal Security law extends. Petitioners herein contend that their position is the reverse of the Ruckle case in that in the case at bar the repurchase of the corporation's shares by the corporation is a purchase to which the anti-fraud policy of the Federal laws should extend.

The Second Circuit in the case of *Vine* v. *Beneficial Finance Company,* 374 F. 2d 627 (2nd Cir., 1967) interpreted and applied Section 10b and Rule 10b-5. The District Court had dismissed the Complaint and the Circuit Court reversed, holding the plaintiff had an individual federal claim and that plaintiff must be regarded as a "seller".

Plaintiff, Vine, was owner of Class A Common Stock of Crown Finance Company. Vine claimed that Class B stockholders, being the officers and directors of Crown, conspired with Beneficial, whereby Bene-

ficial was enabled to acquire the Class B stock by paying a high price to Class B stockholders and underpaying Class A stockholders. They made a tender to acquire Class A stock and the Court pointed out there was fraud in the purchase of this Class A stock. Having acquired 95% of Class A stock, Beneficial was able to merge Crown into Beneficial without Class A stockholders' voting on it. This was a "short form merger" and plaintiff then had the option of accepting defendant's offer or having the stock appraised. The Court held that thereby plaintiff became a "seller", even though no sale was made. It should be noted that the Securities and Exchange Commission entered the case and expressed the opinion that a plaintiff need not be a "selling" stockholder so long as the Rule has been violated and plaintiff's stock lost value. It cites *Birnbaum, supra; O'Neill* v. *Maytag,* 339 F. 2d 764 (2nd Cir., 1964) and *List* v. *Fashion Park, Inc.,* 340 F. 2d 457 (2nd Cir., 1965) and states that these cases have been too broadly read and can be distinguished. The Court held plaintiff stated an *individual* federal claim.

In the case of *Mutual Shares Co.* v. *Genesco,* 384 F. 2d 540 (2nd Cir., 1967) the plaintiff and two other corporations were owners of stock of the S. H. Kress and Company. It is alleged that the defendants, Genesco and Maxey Jarman, acquired 94% of the stock of Kress pursuant to a fraudulent conspiracy, acquired control of Kress, used Kress property to finance the acquisition, and that defendants manage Kress and appropriate its assets for Genesco's benefit. Plaintiff claimed it was euchred into buying Kress stock and still owned

it. After plaintiff became a shareholder it is further alleged the defendants manipulated the market of Kress stock and kept the dividends down to a minimum.

The lower court held no claim was stated. The Second Circuit allowed plaintiff's claim for an injunction under Rule 10b-5 as to the acts of defendants in manipulation and diversion and in keeping the dividends low to force minority holders to sell. The claim for damages was denied, but for the reason that there was a lack of a causal connection between the acts and any damages to plaintiff. However, we believe this case specifically holds that the fact that plaintiffs have not sold their stock is not controlling.

The Third Circuit Court of Appeals decided the case of *Pappas* v. *Moss,* 393 F. 2d 865 (3rd Cir., 1968), which was a stockholders' derivative action. It was based on the alleged wrongful acts of defendants in connection with the issuance of additional shares of corporate stock and the selling of some of these shares to themselves (insiders) at a price below the fair value. While reversing a lower court's decision allowing recovery based on the directors' purchasing of some of the stock, the Court held that with sufficient proof a violation of Rule 10b-5 may be found. There were fraudulent representations in connection with a resolution authorizing the issuance of the stock. *The Court points out that the deception of the independent stockholders is no less real because "formalistically" the corporate entity was the victim of the fraud.* The defendants relied on *Birnbaum and O'Neill.* The Court states that defendants' interpretation restricts the ap-

plication of the Rule in a way that is at odds with its basic purpose. The Securities and Exchange Commission entered in the case and pointed out that *Vine* and *Brod (A. T. Brod & Co.* v. *Perlow,* 375 F. 2d 393 (2nd Cir., 1967)) have undermined *Birnbaum* and *O'Neill.*

The Fifth Circuit Court of Appeals in the case of *Hooper* v. *Mountain States Securities Corporation,* 282 F. 2d 195 (5th Cir., 1960), held that the issuance of corporate stock constituted a sale. In referring to Rule 10b-5, the Court said this rule is more sweeping:

> "It greatly expands the protection frequently hemmed in by the traditional concepts of common law misrepresentation and deceit, the requirement of privity, proof of specific damage, inadequacy of the right of recession or right to recover up to par value of stock of a much greater value."

The Seventh Circuit Court of Appeals in *Dasho* v. *Susquehanna Corporation,* 380 F. 2d 262 (7th Cir., 1967) reversed the lower court's decision which had dismissed this derivative action. Plaintiff charged a conspiracy to defraud Susquehanna in the sale and purchase of securities in violation of Sections 17a, 10b and Rule 10b-5 and in distributing false proxies. Plaintiff charged that defendants caused Susquehanna to acquire by indirection 435,000 shares of its own stock at a price in excess of its market value. This was to be accomplished by a device of a sale of shares by a particular group of shareholders to Gypsum Company, acting through one of the defendants, Karholz, followed by a merger of Gypsum into Susquehanna. On

the election of officers and directors it was necessary to solicit proxies and in the proxies they did not inform the shareholders of the plan of the group to merge with Gypsum. The merger plan involved a gross overvaluation of Gypsum stock and Susquehanna would have acquired its own stock at $1,740,000 in excess of its fair value. The defendants contended that plaintiff was not a purchaser or seller. The plaintiff contended that the issuance by a corporation of shares to be exchanged for shares or assets of another corporation constituted the issuing corporation either a seller or a purchaser of securities entitled to the protection of the securities laws.

The Court there stated that the purpose of Congress was to make control of security transactions reasonably complete and effective to accomplish the purpose of legislation. It cites *Ruckle, supra,* as authority for the proposition that issuance by a corporation of its own shares is a sale to which the anti-fraud policy extends. The Court held that the acquistion or disposition of securities in exchange for other securities falls within the statutory definition.

We think the Court of Appeals erred in concluding that Petitioners' contention, if allowed, would open the door to federal jurisdiction in claims for damages against corporate directors and officers arising out of breach of their fiduciary duties. This is the same error that the District Court made when it adopted the Opinion as drawn up by Respondents' counsel. Mere fiduciary duties are not involved in these actions. What are involved are violations of the Federal Statutes and

we feel the persons injured or damaged thereby should be protected by the Federal Courts. The respondents violated the criminal provisions of the securities acts and the fraudulent conspiracy is the heart of these actions, not simply violation of a fiduciary duty. It will be shown on proof that the basis of the civil claims herein were excluded from the previous settlement of a derivative action in the Southern District of New York on the basis and for the reason these claims were based on the same facts for which certain of the respondents were being prosecuted in Federal Court in New York.

II. Did the Court Improperly Affirm the Dismissal of the Actions For Lack of Jurisdiction in Holding That Petitioners Had No Personal Remedy But Only a Remedy Through a Derivative Action, Where Petitioners Have Alleged That the Respondent Directors Are in Control of the Corporation, Have Violated Various Provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and the Rules Thereunder, and That it Would be Futile to Seek to Have the Directors Take Action, and Where as Alleged Here, the Respondent Directors and Officers and Their Families Were Controlling Shareholders so That a Recovery in a Derivative Action Would Inure to the Benefit of the Wrongdoers?

Petitioners contend that they have a right to bring these actions as individuals and are not restricted to relief in a derivative or class action.

Petitioners alleged that Louis E. Wolfson and his family, and persons and corporations which he con-

trols, dominate and control the corporation, and that a demand on the corporation to bring an action against the respondent wrongdoers would have been futile and useless.

Petitioners also alleged that they bring these actions as individual shareholders because any action on behalf of the other shareholders would insure to the benefit of respondents and particularly, Louis E. Wolfson, to the extent of their stock interest, and such would be futile and unwarranted as they would be profiting from their own wrongs.

As noted above, the case of *J. C. Case Co.* v. *Borak, supra,* held that under Section 14a there is a right of action as to both derivative and *direct* causes. The Court there stated that the Act was for the *protection of investors* and implies availability of judicial relief where necessary to achieve that result.

It is petitioners' position that any remedy for the corporation or for all of the shareholders would be meaningless, as the respondents, some of whom are controlling shareholders, would reap the benefit and would not be required to make petitioners whole. Petitioners have been impressed with this fact by their experience in the derivative actions filed in New York (which actions excluded the facts relied on in the present cases) against some of the same persons where the Court approved a settlement which benefitted only the defendants and the attorneys and meant nothing to the value of petitioners' interest in the corporation.

Petitioners further feel, as pointed out to the Court below, that since the proof will show that Merritt,

Chapman & Scott Corporation is in liquidation, there is all the more reason to grant petitioners the individual relief sought herein.

The Ninth Circuit Court of Appeals decided the case of *Matheson* v. *Armbrust*, 284 F. 2d 670 (9th Cir., 1960), which was an action by Armbrust to cancel a contract and for damages on account of defendant Matheson's scheme to defraud in connection with the stock of Hauling Company. There it was alleged the defendant, Matheson, made gross misstatements as to the financial condition of the corporation. It was held that the Court had jurisdiction and the *private civil remedy* was approved.

Although different on its facts, *Stevens* v. *Vowell*, 343 F. 2d 374 (10th Cir., 1965), was an action under Section 10b and Rule 10b-5 to recover funds invested in a corporation. It was a suit by an individual and the Court allowed the individual action.

The Second Circuit Court decided the case of *Vine* v. *Beneficial Finance Company, supra.* While it is not clear from the opinion what type of actions were set up it does appear that Vine, the plaintiff, was an individual Class A stockholder. It appears that Vine sought damages to be paid pro-rata to Class A stockholders who did not participate in wrongdoing. The Court held that Vine had an individual federal claim under Section 10b and Rule 10b-5. We do not see any reason why petitioners, in the cases at bar, should not be permitted to assert their individual rights. *Vine* was cited with approval in the Supreme Court decision

of *Securities and Exchange Commission* v. *National Securities, Inc., supra.* The Court in the *Vine* case recognized the meaninglessness of a derivative suit on behalf of Crown Corporation, a corporation swallowed up by a subsidiary of the defendant wrongdoer. Petitioners in the cases at bar are of the opinion that a derivative action would be meaningless in the circumstances, particularly where the Merritt corporation is now in liquidation.

Another Second Circuit opinion is that of *Mutual Shares Corp.* v. *Genesco, supra,* which involved an action by Mutual Shares Corp. and two other corporations, all three of which were shareholders, alleging violation of the Securities Acts. There the claim for damages was denied because of lack of causal connection, not because it was a suit by a particular shareholder. This case is in accordance with petitioners' contention that they may maintain the actions individually. The dissenting opinion points out specifically that it is not a class action and that plaintiff seeks to be paid the fair value of its pro-rata shares of the uses of the business, assets and credit of S. H. Kress and Company wrongfully made by defendants, and that the plaintiff therein is a present shareholder.

CONCLUSION.

Petitioners urge the Court to consider thoroughly their contentions that as investors they should be protected by the Federal Statutes and that the change in their position as shareholders resulting from the manipulations of the stock of Merritt-Chapman & Scott Corporation and the buying and selling of said stock and the sale and mergers of subsidiary corporations as set forth above, which were a part of the conspiracy alleged, places them in a changed position just as much as the shareholders in Producers Life were misled and changed their position as set out in *Securities and Exchange Commission* v. *National Securities, Inc., supra.*

It is submitted that under the decisions referred to, the rule relied on by the respondents and the Court of Appeals that it is necessary for a plaintiff to be a purchaser or seller has eroded and should not be held applicable in a situation of this kind.

While petitioners did not lose their status as shareholders, they certainly changed their position by reason of respondents' conduct in pouring out the assets of the corporation to purchase stock at prices that paid Kosow, Kleven and others a considerable profit not offered petitioners. There seems to be little real difference whether they were bilked in an actual sale or merger or bilked by reduction in value of their stock. In the words of the Supreme Court in *Securities and Exchange Commission* v. *National Securities, Inc., supra,* "here an alleged deception has affected individual shareholder's decisions in ways not at all unlike

that involved in a typical cash sale or share exchange." While it was the same company name, it was a different company in substance after respondents' manipulations and purchases and sales, and petitioners' positions have changed and they were injured thereby. Petitioners request that this Petition be granted in order that the law on the questions presented can be clarified for the public, in order that persons dealing in stocks can be told that they cannot violate these laws and take advantage of those shareholders who are not in a position to know the facts, without being liable for damages to other shareholders, and in order that these petitioners may have an opportunity for justice through a jury trial of their claims.

Respectfully submitted,

JOHN G. HICKS,
716 Louisville Trust Building,
Louisville, Kentucky 40202,
Attorney for Petitioners.